



State Bar of Michigan

Michael Franck Building
306 Townsend Street
Lansing, Michigan 48933-2083
Telephone: (517) 346-6300 or (800) 968-1442
Fax: (517) 372-2410
e-mail: jberry@mail.michbar.org

John T. Berry
Executive Director

December 4, 2003

Hon. Maura D. Corrigan
Chief Justice
Michigan Supreme Court
Michigan Hall of Justice
925 W. Ottawa
Lansing, MI 48909

RECEIVED
DEC 05 2003
OFFICE OF
THE CHIEF JUSTICE

Re: ADM File No. 2002-29
Proposed Standards for Imposing Lawyer Sanctions

Dear Chief Justice Corrigan:

At its meeting on November 14, 2003, the State Bar of Michigan's Representative Assembly considered the proposed Standards for Imposing Lawyer Sanctions, as published for comment by the Court. At that same meeting, the Representative Assembly considered all of the major revisions to the Michigan Rules of Professional Conduct.

As the ethics rules were studied and debated, it became clear that it is difficult to make informed recommendations on sanctions for violating the ethics rules, when the ethics rules themselves may be changed. The published proposed Standards for Imposing Lawyer Sanctions, for example, in many instances cite ethics rules by number in the discipline standards. Some of the proposed ethics rules are numbered differently than the current rules, so wholesale changes to the standards may be necessary if the ethics rules are amended.

For this reason, the Representative Assembly adopted the following resolutions concerning the proposed Standards for Imposing Lawyer Sanctions:

BE IT RESOLVED THAT, the State Bar of Michigan urges that the Michigan Supreme Court not adopt Standards for Lawyer Sanctions until such time as they can be the subject of comment and public hearing in conjunction with the Proposed Rules of Professional Conduct, and that the two should ultimately be adopted and implemented contemporaneously so as to ensure consistency.

BE IT FURTHER RESOLVED THAT, the State Bar of Michigan advocates that the Michigan Rules of Professional Conduct and the Standards for Lawyer Sanctions provide for action other than public discipline in instances of isolated occurrences of attorney negligence when in the interests of both the Bar and public.

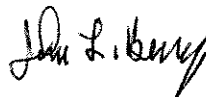


BE IT FURTHER RESOLVED that should the Court wish to proceed with adoption of Standards for Lawyer Sanctions prior to the conclusion of the process for amendment of the Michigan Rules of Professional Conduct the Assembly urges the Court to carefully consider the views expressed by State Bar of Michigan Committees and Sections and in particular the comprehensive work of the Professional and Judicial Ethics Committee and the Special Committee on Grievance.

Attached is the comprehensive report prepared by the Representative Assembly after its meeting on November 14, 2003. We request that the Court give consideration to the recommendations found in that report.

Thank you for the opportunity to provide the Court with the State Bar of Michigan's position on the proposed Standards for Lawyer Sanctions. If we can provide any additional input to the Court, please let me know.

Very truly yours,

A handwritten signature in black ink, appearing to read "John T. Berry". The signature is fluid and cursive, with the first name "John" and last name "Berry" clearly distinguishable.

John T. Berry

cc: Linda Mohny Rhodus
Corbin R. Davis

**REPORT OF ASSEMBLY ACTION ON
PROPOSED RULES OF PROFESSIONAL CONDUCT AND
PROPOSED STANDARDS FOR IMPOSING ATTORNEY SANCTIONS**

The State Bar of Michigan tasked its Standing Committee on Ethics to review the ABA proposed Model Rules of Professional Conduct, and compare them to the existing Michigan Rules, with the goal of recommending which Model Rules should be adopted in Michigan and which should not. They, like the ABA before them, invested countless hours pouring over all available materials and debating even the most minute differences and concerns. Their product was presented to the Representative Assembly for debate at a special session of the Assembly on November 14, 2003.

The size of the Representative Assembly makes it an ineffective body for deliberating the specific verbiage of so lengthy and complex a series of Rules, particularly in the limited time available. Where the differences in proposed rules involve only the language used and/or how best to accomplish an agreed upon goal, they are better left to deliberative bodies smaller than the Assembly, (most importantly to Bar Sections and Committees with specific areas of expertise), and ultimately to the Supreme Court itself. However where there is a significant substantive difference between proposals it is important that the Supreme Court be able to access the relative consensus of the State Bar of Michigan. The appropriate forum to address these more fundamental substantive issues on behalf of State Bar membership is the Bar's largest and most representative body, the Assembly. .

To achieve this goal, the Assembly sought comment from State Bar Committees, Sections and members. Areas of substantive difference were identified and prioritized. To the greatest extent possible, the substantive issues were then pared down to their core. This permitted the Assembly to take a position on the fundamental policy concern, without becoming caught up in drafting language.

In most instances, the positions voted upon were consistent with either the current Michigan Rule, the Ethics Committee's proposed rule, the ABA proposed rule, or more than one of the above. The Representative Assembly's intent was not to adopt or advocate for the language of any rule in its entirety, but to provide the Court with information useful in its deliberations on which proposed rule to publish for comment. Debate on whether proposed language can be improved upon will continue after publication of a complete set of proposed rules by the Court. Where the proposed rule published is consistent with Bar policy as adopted by the Assembly and noted in the following pages, Bar entities will be encouraged to review the proposals and advocate directly to the Court, or through the Assembly where appropriate, for language that will best implement the policy's intent. Should the Court opt to publish a proposed rule that is inconsistent with adopted Bar policy, we shall continue to advocate to the Court on behalf of a rule that reflects the wishes of Bar members.

As the final policy making body of the State Bar of Michigan, it is the responsibility of the Representative Assembly to speak with one voice on behalf of the Bar's many members. Part of this responsibility is also recognizing that there are instances where the informed, well-reasoned opinions of Bar members are sufficiently divergent that it is incumbent upon the Assembly to express the relative strength of both the majority opinion and of an opinion held by a significant minority. To this end, a minority opinion is noted (*in italics*) whenever it was expressed by 25% or more of the Assembly members voting. In one instance, two minority opinions are noted, but neither having received the support of more than 50% of the members voting, the Assembly did not adopt either as the position of the State Bar. If no minority position was sufficiently supported, only the majority position (**in bold**) is noted. Thus, where only one position is noted, it represents the votes of over 75% of the members voting.

The Assembly's goal has been to provide the Court with as much useful information as possible, as quickly as possible. The adopted process enabled us to inform you of the Bar's position on the matters of substantive policy most important to our members prior to publication of the rules the Court proposes for adoption. It is our hope that the Court will consider the opinions of the Attorneys of the State of Michigan in making its determinations on what rules it will ultimately propose for adoption.

AOI 2002-29:

Prior to debating the proposed Rules of Professional Conduct, the Assembly addressed the Administrative Order proposing Attorney Sanction Standards. The Assembly adopted the following resolution:

STATE BAR OF MICHIGAN POSITION
By vote of the Representative Assembly on November 14, 2003

BE IT RESOLVED THAT, the State Bar of Michigan urges that the Michigan Supreme Court not adopt Standards for Lawyer Sanctions until such time as they can be the subject of comment and public hearing in conjunction with the Proposed Rules of Professional Conduct, and that the two should ultimately be adopted and implemented contemporaneously so as to ensure consistency.

BE IT FURTHER RESOLVED THAT, the State Bar of Michigan advocates that the Michigan Rules of Professional Conduct and the Standards for Lawyer Sanctions provide for action other than public discipline in instances of isolated occurrences of attorney negligence when in the interests of both the Bar and public.

BE IT FURTHER RESOLVED that should the Court wish to proceed with adoption of Standards for Lawyer Sanctions prior to the conclusion of the process for amendment of the Michigan Rules of Professional Conduct, the Assembly urges the Court to carefully consider the views expressed by State Bar of Michigan Committees and Sections and in particular the comprehensive work of the Professional and Judicial Ethics Committee and the Special Committee on Grievance.

It is important to note the interplay between this resolution and many resolutions relating to individual proposed Rules of Professional Conduct. Particularly good examples of this interplay are the proposed rules relating to the requirement that conflict waivers be confirmed “in writing.” Although virtually every Assembly member agreed that such waivers should be signed where possible and subsequently confirmed in later writing if a signed consent cannot be obtained contemporaneously, a solid majority of Assembly members voted to oppose the inclusion of an “in writing” requirement in the Rules of Professional Conduct because they believe failure to observe a ‘best practice’ should not standing alone be the trigger for a disciplinary process.

MRPC scope:

STATE BAR OF MICHIGAN POSITION
By vote of the Representative Assembly on November 14, 2003

Section [20] of the Preamble and Scope of the MRPC should state, “Violation of a Rule does not itself give rise to a cause of action against a lawyer nor does it create any presumption in such a case that a legal duty has been breached.” A similar Rule will be added.

The Assembly strongly voiced a position that the rules need to specifically state that they may not be used to create a cause of action or a presumption that a legal duty has been breached. Therefore, the assembly strongly opposes any change from the current MRPC’s absolute language (“rules do not”) to the ABA’s watered down language (“rule should not”). The Assembly felt so strongly about this that it voted to include the in both the preamble and the Rules. There is no minority position.

MRPC and “in writing”:

STATE BAR OF MICHIGAN POSITION
By vote of the Representative Assembly on November 14, 2003

MRPC 1.0(b), 1.7(b), 1.9(b), 1.10(d), 1.11(a), 1.12 and 1.18(d) should not require lawyers to obtain written consent or provide written notice as set forth in those rules.

As referenced in the earlier discussion of AO 2003-29, the Assembly’s vote on this issue was absolute, but potentially misleading. There is no quarrel with the contention that an “in writing” requirement is a ‘best practice’ and that it should be encouraged whenever possible. However, it is not believed to be an appropriate ‘rule’ for which any alleged violation should result in a disciplinary investigation and possible sanction. The Assembly’s vote here has less to do with opposition to the writing requirement, than it does with any requirement that exposes a lawyer to sanctions or discipline for actions (or failures to act) that do not harm the client or court, and do not involve ‘unethical’ conduct.

MRPC and “informed consent”:

STATE BAR OF MICHIGAN POSITION
By vote of the Representative Assembly on November 14, 2003

The Michigan Rules of Professional Conduct should define the term “informed consent” and require that where a client’s consent is required that it be “informed” consent.

Minority position to above: (Vote of 44/35/3)

The Michigan Rules of Professional Conduct should delete the proposed definition of “informed consent” [Rule 1.0(e)], and delete the word “informed” from each of the eleven individual proposed rules. [1.2(c), 1.4(a)(1), 1.6(a), 1.7(b)(4), 1.8(a)(3), 1.9(b)(2), 1.10(d), 1.11(a)(2), 1.12(a), 1.18(d)(1) and 2.3(b)].

The majority of the Assembly voted to adopt the ABA proposed definition and requirement that consent be “informed consent.” A minority opposed the adoption of the proposed standard.

The minority position was not, it must be noted, based upon any suggestion that a client’s uninformed consent could ever be sufficient. Opposition to the term “informed consent” stems from a concern that attempts to define informed consent will breed a myriad of potential allegations that a given consent, though knowing, generally understood, and resulting in no actual conflict or harm to a client, is still a technical violation of the rule requiring it be “informed.” Particularly if combined with an “in writing” requirement, there is a fear that attorneys will have to obtain lengthy, almost contract like in detail, consent agreements on the most minor of possible conflicts. Further, the Assembly anticipates that unharmed, but for any other reason unhappy, clients will file grievances for technical violations that must then be investigated, and even if not ultimately prosecuted will cause harm to the lawyer’s practice and waste disciplinary resources. The majority did not so much disagree with the minority as it simply felt that the principle was so fundamentally a part of the lawyer/client relationship as to outweigh the concerns.

MRPC 1.5:

STATE BAR OF MICHIGAN POSITION
By vote of the Representative Assembly on November 14, 2003

MRPC 1.5 should not require that fee divisions be proportional.

MRPC 1.5 should not require a client’s consent to any division of fees by lawyers not of the same firm.

MRPC 1.5 should prohibit fees that are “illegal or clearly excessive.”

MRPC 1.5 should expressly permit reasonable and earned nonrefundable retainers.

The Assembly adopted all four Assembly positions relating to the proposals from MRPC 1.5, voting unanimously to adopt the position in opposition to a requirement that fee divisions be proportional. Discussion focused on the unintended effects the rule could have of (1) tempting lawyers to accept a cases they may not be fully qualified to handle, (2) creating enforceability issues surrounding the quantification of the value of services provided (including consulting).

MRPC 1.7:

STATE BAR OF MICHIGAN POSITION
By vote of the Representative Assembly on November 14, 2003

MRPC 1.7 should provide commentary indicating that a lawyer representing a corporate fiduciary only as the personal representative of a decedent's estate, as trustee of a trust, and/or as a conservator, not for this reason alone be barred from representing any client with interests adverse to the corporate fiduciary.

The Assembly here voted to support the request of the Probate and Estate Planning Section that the Rules should clarify that in certain limited instances, simply acting as a corporate fiduciary would not necessarily create a conflict preventing that attorney from opposing unrelated interests of that corporate entity.

MRPC 1.8:

STATE BAR OF MICHIGAN POSITION
By vote of the Representative Assembly on November 14, 2003

MRPC 1.8 should prohibit sexual relations between an attorney and that attorney's client unless a consensual sexual relationship existed when the client lawyer relationship began.

This position is consistent with the existing State Bar position previously adopted by Assembly resolution on a similar MRPC proposal in 1998.

MRPC 1.15:

STATE BAR OF MICHIGAN POSITION
By vote of the Representative Assembly on November 14, 2003

Plurality position: (Vote of 38/27/13)

MRPC 1.15 should require lawyers to deposit into a client trust account legal fees and expenses that have been paid in advance.

Minority position to above:

MRPC 1.15 should require lawyers to deposit into a client trust account legal fees, but not expenses, that have been paid in advance.

The Michigan Rules of Professional Conduct should provide that nonrefundable retainers may be placed in the lawyer's account unless a refund is determined to be necessary, at which time the retainer shall be treated as client funds.

The Assembly considered two separate questions related to the rule on safekeeping of property. The debate on whether funds collected for expenses should be required to be deposited into a client trust account was inconclusive. A plurality of those voting believed it should, and a reportable minority believed it should not. Because a significant number of members chose not to recommend the SBM adopt either position, no majority existed. In a separate item also related to MRPC 1.15, members voted for the inclusion of a provision allowing nonrefundable retainers to be placed in the lawyer's account.

MRPC 1.17:

STATE BAR OF MICHIGAN POSITION
By vote of the Representative Assembly on November 14, 2003

MRPC 1.17 should allow lawyers to sell or purchase an "area of law practice" in addition to a private law practice.

MRPC 1.17 should allow a lawyer to refuse to undertake representation unless the client consents to pay fees regularly charged by that lawyer for rendering substantially similar services to other clients.

The Assembly supported including a rule providing the ability to sell “an area of practice” rather than providing only for the sale of the practice as a whole. It also believes that the rules should provide that an attorney purchasing all or part of a practice may refuse to represent a client who will not agree to pay the purchasing lawyer’s usual and reasonable fees.

MRPC 1.18:

STATE BAR OF MICHIGAN POSITION
By vote of the Representative Assembly on November 14, 2003

The Michigan Rules of Professional Conduct should not include a Rule governing the period during which a lawyer and prospective client are considering whether to form a client-lawyer relationship.

The Assembly did not receive any comments in opposition to the proposed Rule in advance of the meeting, and no speaker rose to address this rule during debate. The basis of the Assembly position being unarticulated, the resolution will have to speak for itself.

MRPC 4.1:

STATE BAR OF MICHIGAN POSITION
By vote of the Representative Assembly on November 14, 2003

The Michigan Rules of Professional Conduct should not include an affirmative duty on a lawyer to disclose a material fact to a third person when they know failing to do so would assist in a client’s criminal or fraudulent act.

This proposed rule was the subject of a great deal of concern that ultimately was not as strong as the feeling that it was important to emphasize an attorneys higher duty to the public, and to the justice system.

MRPC 4.2:

STATE BAR OF MICHIGAN POSITION
By vote of the Representative Assembly on November 14, 2003

MRPC 4.2 should not be amended to apply to represented “persons” rather than “parties.”

Minority position to above: (Vote of 55/26/0)

MRPC 4.2 should be amended to apply to represented “persons” rather than “parties.”

MRPC 4.2 should if amended to apply to represented “persons,” include a law enforcement exception recognizing that U.S. and Michigan constitutional provisions govern such contacts.

The Assembly voted on two separate, but related, issues relating to proposed MRPC 4.2 provisions.

In it’s first vote on point the Assembly, with a reported minority, stated opposition to changing MRPC 4.2 so that it would apply to persons. It is unclear whether, or how much, this vote was affected by the anticipation of the second vote. In both instances the negative and unnecessary effect the change would have on law enforcement was of overwhelming concern. It is not possible to determine whether some who opposed the language change would have voted differently had they been certain the Court would eventually adopt a law enforcement exception.

With the second vote, the Assembly without a reported minority, adopted a position in favor of a “law enforcement exception” to any requirement that MRPC 4.2 be applied to “persons” rather than “parties”. This position was based mostly upon the negative effect the change would have on the ability to conduct criminal investigations and the deterrent effect it would have on independent police officers that might wish to consult with a prosecutor before deciding to take a particular action. There was also concern expressed that an individual associated with an organization was not always best represented by involvement of the

organization's attorney. (e.g. a Street dealer arrested as part of an investigation into the continuing criminal enterprise of a drug gang or organization.)

MRPC 5.5:

STATE BAR OF MICHIGAN POSITION
By vote of the Representative Assembly on November 14, 2003

The Michigan Rules of Professional Conduct should include a Rule like proposed ABA Model Rule 5.5 governing an out of state lawyer's professional activities within the state

The Assembly concluded that there is a need for a rule governing an out of state lawyer's professional activities within Michigan.

MRPC 6.1:

STATE BAR OF MICHIGAN POSITION
By vote of the Representative Assembly on November 14, 2003

MRPC 6.1 should include a standard of 30 hours, 3 cases or \$300 per year.

MRPC 6.1 should more broadly define pro bono services to include direct services to persons of limited means, or services to charitable, religious, civic, community, governmental, and educational organizations, or to secure or protect civil rights, civil liberties or public rights, including services in activities for improving the law, the legal system or the legal profession.

The Assembly voted in favor of continuing the current guidelines for pro bono service (3 cases, 30 hours or \$300 per year). The Assembly also endorsed the use of a broader definition of what would qualify as pro bono service.

MRPC 7.6:

STATE BAR OF MICHIGAN POSITION
By vote of the Representative Assembly on November 14, 2003

MRPC 7.6 should be deleted in its entirety.

The Assembly's rejection of the proposed MRPC 7.6 should not be misunderstood as a rejection of the proposed rule's intent. The Assembly opposes the proposed rule because it fails to actually further its expressed intent, a goal the Assembly shares. No Assembly member argued that a lawyer should be permitted to make a political contribution with the intent of obtaining an appointment, or even that this would be anything short of unethical conduct. It is not clear, however, how within the disciplinary system, the contributing attorney's intent would ever be established. Additionally the proposed rule applies only to financial contributions by attorneys, so at best it would (as described by one Assembly member) result in the lawyer volunteering time while the spouse writes the checks. Further, the rule as proposed would permit an attorney to enter a court's appointment pool, but then avoid any particular judge simply by making a small financial contribution to that judge's campaign.

MRPC 1.6, 3.8 and 6.1:

STATE BAR OF MICHIGAN POSITION
By vote of the Representative Assembly on November 14, 2003

MRPC 3.8, 6.3 and 6.6 should remain the same (retaining the current Michigan Rule).

Each of these three proposed rules is an instance where the Professional and Judicial Ethics Committee recommended to the Assembly the continuation of the current Michigan Rule. Because this would result in Michigan's Rule being different than the Model Rule recommended by the ABA, the Assembly wished to specifically adopt a position in favor of retaining the current Michigan Rule.

This Report of Assembly Action on proposed Michigan Rules of Professional Conduct and proposed Michigan Standards for Imposing Attorney Sanctions is presented to the Michigan Supreme Court on behalf of the State Bar of Michigan Representative Assembly by:

November 25, 2003

Daniel M. Levy
Assembly Chairperson

Elizabeth A. Jamieson
Assembly Vice Chairperson

Lori A. Buiteweg
Assembly Clerk